1 of 2 DOCUMENTS

THE STATE OF OHIO, APPELLEE, v. SPISAK, APPELLANT

No. 86-1099

Supreme Court of Ohio

36 Ohio St. 3d 80; 521 N.E.2d 800; 1988 Ohio LEXIS 85

April 13, 1988, Decided

PRIOR HISTORY: [***1]

APPEAL from the Court of Appeals for Cuyahoga County.

On February 1, 1982, the body of the Reverend Horace T. Rickerson was discovered by a fellow student on the floor of a restroom on the Cleveland State University campus. Rickerson had been shot seven times by an assailant from a distance of more than eighteen inches. Four spent bullet casings were recovered from the scene.

On the evening of June 4, 1982, John Hardaway was shot seven times while waiting for an RTA train at the West 117th Rapid Station in Cleveland. He observed a man walking up the platform steps and had turned away when the man opened fire on him. Hardaway survived the shooting, and was later able to identify his assailant as the appellant, Frank G. Spisak. Three pellets and seven shell casings were recovered from the scene.

At approximately 5:00 p.m. on August 9, 1982, Coletta Dartt, an employee of Cleveland State University, left her office to use the restroom. Upon exiting the stall, she encountered the appellant, holding a gun, who ordered her back into the stall. Instead, Dartt shoved appellant out of the way and ran down the hallway. Appellant shot at her, but missed. A pellet was later [***2] removed from a wall in the hallway. Dartt identified the appellant as her assailant.

On August 27, 1982, the body of Timothy Sheehan, an employee of Cleveland State University, was discovered in a restroom at the university by a security guard. The guard had been searching for Sheehan after his office reported that he had failed to answer his beeper page. Sheehan had been shot four times, and two pellets were retrieved from the scene.

On the morning of August 30, 1982, the body of a young student, Brian Warford, was discovered in a bus shelter on the campus of Cleveland State University. Warford died from a single gunshot wound to the head, although five spent .22 caliber casings were recovered from the scene.

On September 4, 1982, Cleveland police answered a call that a man was firing shots from a window at 1367 East 53rd Street. The police were directed to appellant's apartment and appellant, after admitting he had fired one shot, invited the officers inside. A shotgun and a .22 caliber automatic pistol were observed in the room. Appellant made a suspicious move toward the couch but was stopped by one of the officers who discovered a loaded .38 caliber handgun and a [***3] two-shot derringer under the couch cushions. Appellant was arrested for possession of unregistered handguns and discharging firearms within city limits, but was later released on bond. The weapons, however, were confiscated. Early the next day, an anonymous caller told police that the confiscated weapons had been used in the Cleveland State University shootings. Ballistics tests confirmed the tip. A warrant was obtained, and the police returned to Spisak's apartment, confiscating several items including newspaper clippings of the homicides and Nazi-White Power paraphernalia. Appellant was later arrested, hiding in the basement of a

friend's house. During a brief search of appellant's suitcase at the scene, police discovered the beeper paper belonging to Sheehan.

Appellant later admitted to shooting Rickerson for allegedly making a homosexual advance toward him; to killing Sheehan as a possible witness to the Rickerson shooting; to killing Warford while on a "hunting party" looking for a black person to kill; and, finally, to shooting at Dartt and to shooting Hardaway. He also told police he had replaced the barrel of the .22 caliber handgun in order to conceal the murder [***4] weapon.

Appellant was brought to trial under an eight-count indictment containing twenty specifications, including the aggravated murders of Rickerson, Sheehan and Warford and appurtenant death specifications. Appellant pleaded not guilty and not guilty by reason of insanity, claiming to be a follower of Adolf Hitler. He was found to have been competent, however, at the time of the acts, and the jury returned guilty verdicts on all counts and specifications, except the alleged aggravated robbery of Warford.

Following the mitigation hearing, the jury recommended that the sentence of death be imposed. In a separate opinion, the trial court concurred, imposing the death sentence. Appellant was also sentenced to terms of seven to twenty-five years on each conviction of attempted murder and aggravated robbery.

The court of appeals modified the judgment of the trial court, holding that appellant should have been convicted of only one of the two counts of the aggravated murder of Timothy Sheehan and affirmed as modified. On March 6, 1985, this court remanded the cause to the court of appeals for supplementation of the record with certain hearing requests. The court of appeals [***5] considered the supplemented documents and re-affirmed its earlier decision. The cause was remanded a second time by this court with instructions to consider the additional arguments raised by the State Public Defender's Office, which had been appointed to represent the appellant while the first appeal was pending. The court of appeals considered those arguments and again affirmed the judgment of the trial court, finding the sentence of death to be appropriate in the case.

The cause is now before this court upon an appeal as of right.

DISPOSITION: *Judgment affirmed.*

HEADNOTES

Criminal law -- Aggravated murder -- Purposeful killing of two or more persons -- Death penalty upheld, when.

COUNSEL: *John T. Corrigan,* prosecuting attorney, and *Patricia A. Cleary,* for appellee.

Randall M. Dana, public defender, *David C. Stebbins, Randall L. Porter, Richard J. Vickers* and *Kathleen A. McGarry,* for appellant.

JUDGES: MOYER, C.J., SWEENEY, WHITESIDE, HOLMES and H. BROWN, JJ., concur. DOUGLAS and WRIGHT, JJ., concur in judgment only. WHITESIDE, J., of the Tenth Appellate District, sitting for LOCHER, J.

OPINION BY: PER CURIAM

OPINION

[*82] [**801] Pursuant to R.C. 2929.05(A), this court is required to review all cases in which the sentence of death has been imposed in the same manner in which we [***6] review other criminal cases and, in addition, to independently weigh the aggravating circumstances against the mitigating factors adduced at trial, and determine whether the sentence of death is appropriate in the case at bar. *State* v.. *Maurer* (1984), 15 Ohio St. 3d 239, 15 OBR 379, 473 N.E. 2d 768. However, we are not required to consume limited judicial resources writing opinions which [**802] analyze time-worn legal arguments raised in a multiplicity of printed pages. [1] *State* v.. *Poindexter* (1988), 36 Ohio St. 3d 1, 520 N.E. 2d 568. With these parameters in mind, we have reviewed each of appellant's sixty-four propositions of law and find them to be without merit. We affirm the judgment of the court of appeals and uphold appellant's sentence of death.

1 Appellant's merit brief, reply brief and attached appendix filed in this court comprise over nine hundred pages, all of which supplement a substantial, but average-sized, record of the proceedings in the lower courts. Although we do not presume to impose an arbitrary page limit on

> briefs in appeals from a sentence of death, we encourage the submission of concise, at least colorable, legal arguments, and conservative duplication of a record which we intend to exhaustively review on our own.

[***7] In propositions of law one, nineteen, fifty-four through fifty-six, sixty-two and sixty-four, appellant raises arguments which have previously been raised and rejected in the following cases: *State* v.. *Jenkins* (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E. 2d 264, certiorari denied (1985), 472 U.S. 1032; *Maurer, supra; State* v.. *Buell* (1986), 22 Ohio St. 3d 124, 22 OBR 203, 489 N.E. 2d 795, certiorari denied (1986), 479 U.S. , 93 L. Ed. 2d 165; *State* v.. *Williams* (1986), 23 Ohio St. 3d 16, 23 OBR 13, 490 N.E. 2d 906, certiorari denied (1987), 480 U.S. , 94 L. Ed. 2d 699; and *State* v.. *Steffen* (1987), 31 Ohio St. 3d 111, 31 OBR 273, 509 N.E. 2d 383.

In propositions of law two through eight, ten through fifteen, seventeen, eighteen, twenty-one, twenty-two, twenty-four through thirty-six, thirty-eight through forty-one, forty-three through forty-seven, forty-nine, fifty-one through fifty-three, fifty-seven through sixty-one, and sixty-three, appellant raises arguments which we find to be not well-taken on the basis of our review of the record in light of the following authorities: *Maurer, supra; Donnelly* v.. *DeChristoforo* (1974), [***8] 416 8 U.S. 637; *Darden* v.. *Wainwright* (1986), 477 U.S. 168; *Strickland* v.. *Washington* (1984), 466 U.S. 668; *Evitts* v.. *Lucey* (1985), 469 U.S. 387; *State* v.. *Smith* (1985), 17 Ohio St. 3d 98, 17 OBR 219, 477 N.E. 2d 1128; *State* v.. *Lytle* (1976), 48 Ohio St. 2d 391, 2 O.O. 3d 495, 358 N.E. 2d 623; *State* v.. *Staten* (1969), 18 Ohio St. 2d 13, [*83] 47 O.O. 2d 82, 247 N.E. 2d 293; *State* v.. *Pi Kappa Alpha Fraternity* (1986), 23 Ohio St. 3d 141, 23 OBR 295, 491 N.E. 2d 1129 (distinguished); *Payton* v.. *New York* (1980), 445 U.S. 573 (distinguished); *Rawlings* v.. *Kentucky* (1980), 448 U.S. 98; *State* v.. *Rogers* (1986), 28 Ohio St. 3d 427, 28 OBR 480, 504 N.E. 2d 52, paragraph one of the syllabus (*Rogers II),* reversed on other grounds (1987), 32 Ohio St. 3d 70, 512 N.E. 2d 581; *Buell, supra; Wainwright* v.. *Witt* (1985), 469 U.S. 412; *State* v.. *Rogers* (1985), 17 Ohio St. 3d 174, 17 OBR 414, 478 N.E. 2d 984, paragraph three of the syllabus (*Rogers I),* reversed on other grounds (1987), 32 Ohio St. 3d 70, 512 N.E. 2d 581; *State* v.. *Williams* (1983), 6 Ohio St. 3d 281, 6 OBR 345, 452 N.E. [***9] 2d 1323; *State* v.. *Williams* (1986), *supra; State* v.. *Byrd* (1987), 32 Ohio St. 3d 79, 512 N.E. 2d 611; *State* v.. *Kidder* (1987), 32 Ohio St. 3d 279, 513 N.E. 2d 311; *Illinois* v.. *Allen* (1970), 397 U.S. 337; *State* v.. *White* (1968), 15 Ohio St. 2d 146, 44 O.O. 2d 132, 239 N.E. 2d 65, paragraph two of the syllabus (distinguished); Evid R. 404(B); *State* v.. *Spikes* (1981), 67 Ohio St. 2d 405, 21 O.O. 3d 254, 423 N.E. 2d 1123; *Schade* v.. *Carnegie Body Co*. (1982), 70 Ohio St. 2d 207, 24 O.O. 3d 316, 436 N.E. 2d 1001; *State* v.. *Morales* (1987), 32 Ohio St. 3d 252, 513 N.E. 2d 267; *Maurer, supra,* paragraph seven of the syllabus; *State* v.. *Graven* (1977), 52 Ohio St. 2d 112, 6 O.O. 3d 334, 369 N.E. 2d 1205; *State* v.. *Adams* (1980), 62 Ohio St. 2d 151, 16 O.O. 3d 169, 404 N.E. 2d 144; *State* v.. *Thompson* (1981), 66 Ohio St. 2d 496, 20 O.O. 3d 411, 422 N.E. 2d 855 (distinguished); *State* v.. *Mann* (1985), 19 Ohio St. 3d 34, 19 OBR 28, 482 N.E. 2d 592; *State* v.. *Ferguson* (1983), 5 Ohio St. 3d 160, 5 OBR 380, 450 N.E. 2d 265; *Estelle* v.. *Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d [***10] [**803] 359; *Steffen, supra;* R.C. 2945.39(D); *Doyle* v.. *Ohio* (1976), 426 U.S. 610 (distinguished); *Wainwright* v.. *Greenfield* (1986), 474 U.S. 284 (distinguished); *State* v.. *Fanning* (1982), 1 Ohio St. 3d 19, 1 OBR 57, 437 N.E. 2d 583; *Carter* v.. *Kentucky* (1980), 450 U.S. 288 (distinguished); *State* v.. *Price* (1979), 60 Ohio St. 2d 136, 14 O.O. 3d 379, 398 N.E. 2d 772, paragraph four of the syllabus; *State* v.. *DeMarco* (1987), 31 Ohio St. 3d 191, 31 OBR 390, 509 N.E. 2d 1257 (distinguished); *Chapman* v.. *California* (1967), 386 U.S. 18.

Finally, in propositions of law nine, sixteen, twenty, twenty-three, thirty-seven, forty-two, forty-eight and fifty, appellant raises arguments which we find to be wholly without support in the record. In addition, appellant neither timely objected to nor raised below the errors alleged in propositions of law twenty-one, twenty-two, twenty-nine, thirty, thirty-nine, fifty-one, fifty-two and fifty-three, and has thus waived them: *State* v.. *Williams* (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, vacated in part on other grounds (1978), 438 U.S. 911; *Schade, supra; Fanning,* [***11] *supra; State* v.. *Scott* (1986), 26 Ohio St. 3d 92, 26 OBR 79, 497 N.E. 2d 55. Our review of the record in each instance has failed to establish the presence of plain error. *State* v.. *Long* (1978), 53 Ohio St. 2d 91, 7 O.O. 3d 78, 372 N.E. 2d 804, paragraph three of the syllabus; *Scott, supra,* at 103, 26 OBR at 88-89, 497 N.E. 2d at 64.

In summary, we find no merit in the propositions of

law raised by appellant relevant to the proceedings below or to the constitutionality of this state's death penalty scheme. Proceeding to our independent weighing of the aggravating circumstances and mitigating factors presented herein, we note that appellant's three aggravated murder convictions specify fifteen separate aggravating circumstances [*84] under R.C. 2929.04. However, as pointed out by appellant in his first proposition of law, for purposes of sentencing the doctrine of merger applies herein. *State* v.. *Jenkins, supra*, paragraph five of the syllabus. Each aggravated murder count should thus contain only one specification that appellant's acts were part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. R.C. [***12] 2929.04(A)(5). Similarly, specifications pursuant to R.C. 2929.04(A)(3) (escaping detection, apprehension, trial or punishment) and R.C. 2929.04(A)(7) (felony murder) are duplicative of and thus merge with R.C. 2929.04(A)(5), since these aggravating circumstances arise from the same indivisible course of conduct. Although the court of appeals did not apply the merger doctrine below, we have determined that the jury's consideration of the duplicative aggravating circumstances during sentencing did not affect their verdict. *Jenkins, supra*. Furthermore, we have independently determined that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Of the mitigating factors specified in R.C. 2929.04(B) appellant relied solely on his allegation that he lacked, due to a mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses. R.C. 2929.04(B)(3). Although there was testimony that appellant had characteristics of borderline and schizotypal personality disorders, the bulk of the testimony, from both defense and rebuttal expert witnesses, [***13] established that appellant was sane at the time of the acts, that he could have refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.

Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offenses. Nothing in the nature and circumstances of these deliberate [**804] murders tempers the gravity of the offenses. We concur with the jury and lower courts that the balance of these factors lies heavily, and beyond reasonable doubt, on the side of the aggravating circumstances of which the appellant was convicted.

Finally, considering all our prior decisions affirming a sentence of death, appellant's sentence was not arbitrarily, freakishly or capriciously applied, and is not disproportionate to such prior sentences. Although the majority of such decisions involved a single victim, in *State* v.. *Brooks* [***14] (1986), 25 Ohio St. 3d 144, 25 OBR 190, 495 N.E. 2d 407, we affirmed a death sentence involving the murder of defendant's three sons. In the case *sub judice*, the sentence of death was properly imposed upon appellant.

Accordingly, the judgment of the court of appeals is hereby affirmed.

Judgment Affirmed.

CONCUR BY: DOUGLAS

CONCUR

DOUGLAS, J., concurring. I write separately for the sole purpose of expressing my view that the doctrine of waiver is not applicable to cases where the penalty of death has been imposed.